

No. 83-1237

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**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Francisco Sanchez-Martinez,
Petitioner.

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*These two appendices, contained in the original appendix, are here reprinted for convenience.

APPENDIX I

[714 F.2d 72]

Francisco SANCHEZ-MARTINEZ,
Petitioner-Appellant,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

CA No. 82-5501.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 15, 1983.

Decided June 13, 1983.

In deportation proceeding the Board of Immigration Appeals affirmed holding that petitioner was not a United States citizen. [714 F.2d 73] After de novo hearing, the United States District Court for the District of Arizona, Earl H. Carroll, J., concluded that petitioner was born in Mexico, and petitioner appealed. The Court of Appeals held that district court, which could have concluded that petitioner did not have American birth certificate, that all his American-born siblings had American birth certificates, and that he had Mexican birth certificate, did not err in determining that petitioner was not an American citizen.

Affirmed.

1. Aliens 54.3(4)

Where there had been no prior determination of citizenship, where petitioner's claim to United States citizenship was based solely on his own belief and recollections of others as to his putative birth in United States some 50 years ago, and where he did not claim his citizenship derivatively from United States citizen, no departure was justified from normal practice of rejecting district court's findings of fact only if they are clearly erroneous. Fed.Rules.Civ.Proc.Rule 52(a), 28 U.S.C.A.

2. Aliens 54.1(2)

Declaratory Judgment 342

In de novo district court hearing, citizen who is seeking a declaratory judgment on question of citizenship bears initial burden of proof while in proceedings before Immigration and Naturalization Service, citizen is in position of a defendant and thus in latter proceedings government bears initial burden of proof. Immigration and Nationality Act, § 106(a)(5), as amended, 8 U.S.C.A. § 1105a(a)(5); 28 U.S.C.A. § 2201.

3. Aliens 54.1(4)

District court, which after de novo hearing could properly have found that clear and convincing evidence established that petitioner did not have American birth certificate, that all his American-born siblings had American birth certificates and that he had Mexican birth certificate, did not clearly err in concluding that petitioner was not an American citizen. Immigration and Nationality Act, § 106(a)(5), as amended, 8 U.S.C.A. § 1005a(a)(5); 28 U.S.C.A. § 2201.

Ron Kilgard, Martori, Meyer, Hendricks & Victor, Phoenix, Ariz., for petitioner-appellant.

Elizabeth Jucius Dunn, Phoenix, Ariz., for respondent-appellee.

Appeal from the United States District Court for the District of Arizona.

Before DUNIWAY, SNEED and FARRIS, Circuit Judges.

PER CURIAM:

The Immigration and Naturalization Service initiated deportation proceedings against Francisco Sanchez-Martinez in 1974, alleging that he was not a citizen of the United States. The Service contended that he was born in Imuris, Mexico, while Sanchez-Martinez contended that he was born in Nogales, Arizona. The Immigration Judge held that he was not a United States citizen, and the Board of Immigration Appeals affirmed.

Sanchez-Martinez filed a petition for review with this court. We held that because he had made a non-frivolous claim to citizenship and had raised a genuine issue of material fact as to his place of

birth, he was entitled to a de novo hearing in the district court on the question of citizenship. 8 U.S.C. § 1105a(a)(5).

The district court ruled that the action was for a declaratory judgment pursuant to 28 U.S.C. § 2201 and 8 U.S.C. § 1105a(a)(5). Following a de novo hearing on the question of citizenship, the district court concluded that, although Sanchez-Martinez had established a prima facie case of citizenship, the Service had proved by clear, unequivocal, and convincing evidence that he was born in Mexico. We affirm.

The parties dispute the proper standard for appellate review of the district court's determination. Sanchez-Martinez argues that *Lim v. Mitchell*, 431 F.2d 197, 199 (9th Cir.1970) (quoting *Lee Hon Lung v. Dulles*, [714 F.2d 74] 261 F.2d 719, 724 (9th Cir.1958)), requires that on appeal we "make an independent determination as to whether the evidence introduced by the Service was 'clear, unequivocal, and convincing.' "

Lim, which involved unusual facts, does not provide the standard of review here. In *Lim* there had been a prior determination of identity and citizenship by the Service upon which both the petitioner and the government had relied for many years. *Lim* had claimed his citizenship derivatively from his grandfather, who was born in the United States. The government did not dispute the citizenship of the persons *Lim* claimed as his father and grandfather. The only issue was whether *Lim* was in fact the grandson of the man from whom he claimed his derivative citizenship. The district court found that *Lim* was not a citizen. We reversed, holding that, in light of the Service's prior determination of citizenship and *Lim*'s reliance on it for more than thirty years, the district court had erred in concluding that the government had met its burden of proving by "clear, unequivocal, and convincing" evidence that *Lim* was not a United States citizen. *Lim*, 431 F.2d at 204.

In the present case there has been no prior determination of citizenship. Sanchez-Martinez's claim to United States citizenship is based solely on his own belief and the recollections of others as to his putative birth in the United States some fifty years ago. Further, Sanchez-Martinez does not claim his citizenship derivatively from a citizen of the United States. The facts of this case are not sufficiently similar to those of *Lim* to justify a departure from our normal practice of rejecting a district court's findings of fact only if clearly

erroneous. Fed.R.Civ.P. 52(a); *Yee Tung Gay v. Rusk*, 290 F.2d 630, 632 (9th Cir.1961).

The district court required the government to prove by "clear, unequivocal, and convincing" evidence that Sanchez-Martinez was not a citizen of the United States. In *Yee Tung Gay v. Rusk*, 290 F.2d at 631, we held that a petitioner in a declaratory judgment action in the district court to determine citizenship bore the initial burden of proving citizenship by a preponderance of the evidence. The government may then rebut this showing only by "clear, unequivocal, and convincing" evidence. *Lee Hon Lung v. Dulles*, 261 F.2d at 724. Like *Lim*, however, *Lee Hon Lung* involved a prior determination of citizenship by the Service. Whether the district court in the present case may have erred by imposing this heavy burden of rebuttal proof on the government in the absence of the special circumstances of *Lim* and *Lee Hon Lung* is not before us. Even though the proper burden may have been rebuttal by only a preponderance of the evidence, we do not decide this issue, since Sanchez-Martinez was not prejudiced if the district court held the government to a higher standard of proof than the law required.

In *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 286, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966), the Supreme Court held that in deportation proceedings before the Service, the government bears the initial burden of proving deportability by "clear, unequivocal, and convincing evidence." The *Woodby* standard is identical to the burden that we impose on the government in declaratory judgment actions in which there are special circumstances such as in *Lim* and *Lee Hon Lung*. We do not now decide whether such a standard is applicable in the district court to cases which do not have these special circumstances.¹ [714 F.2d 75]

1. The allocation of the initial burden of proof flows from the nature of the proceeding. In the de novo hearing in district court, the citizen is in the position of a plaintiff seeking a declaratory judgment. 8 U.S.C. § 1105a(a)(5); 28 U.S.C. § 2201. He or she bears the initial burden of proof. In proceedings before the Service, the citizen is in the position of a defendant. It follows that in these latter proceedings the government bears the initial burden of proof. *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362, establishes what this burden must be. We do

The district court could properly have found that the following facts were "clear, unequivocal, and convincing":

- 1) Sanchez-Martinez does not have an American birth certificate.
- 2) All of his American-born siblings have American birth certificates.
- 3) He has a Mexican birth certificate.

The district court was not clearly erroneous in concluding that these facts and other evidence, though disputed, were sufficient to support a determination that Sanchez-Martinez is not an American citizen.

Affirmed.

not decide whether *Woodby* alters our rule that a citizen seeking a declaration of citizenship in the district court is required to make an initial showing of citizen-[714 F.2d 75]ship by a preponderance of the evidence. *Yee Tung Gay v. Rusk*, 290 F.2d at 631.

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | | |
|-------------------------|---|-------------------|
| FRANCISCO SANCHEZ- |) | CA No. 82-5501 |
| MARTINEZ, |) | DC No. CIV 78-170 |
| Petitioner-Appellant, |) | ORDER |
| v. |) | (Arizona) |
| IMMIGRATION AND |) | |
| NATURALIZATION SERVICE, |) | |
| Respondent-Appellee. |) | |
| _____ |) | |

Before: DUNIWAY, SNEED, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Farris have voted to reject the suggestion for rehearing en banc and Judge Duniway would so recommend.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed October 26, 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|-------------------------|---------------|-------------------------|
| FRANCISCO SANCHEZ- |) | [Filed January 7, 1982] |
| MARTINEZ, |) | |
| | Petitioner,) | NO. CIV 78-170 |
| vs. |) | PHX-EHC |
| IMMIGRATION AND |) | |
| NATURALIZATION SERVICE, |) | FINDINGS OF FACT, |
| | Respondent.) | CONCLUSIONS OF |
| |) | LAW, AND ORDER |

The Court having reviewed the exhibits and memoranda of the parties, and being fully advised, enters findings of fact, conclusions of law, and order as follows:

1. On October 24, 1974, the Immigration and Naturalization Service (INS) commenced deportation proceedings against Francisco Sanchez-Martinez (Petitioner or Frank Sanchez).

3. The INS contends Petitioner is a citizen of Mexico having been born in Imuris, Sonora, Mexico on November 29, 1933. Petitioner claims that he was born the same date in Nogales, Arizona.

A-7

5. Petitioner filed a petition for review with the United States Court of Appeals, Ninth Circuit, seeking transfer of the proceeding to the District Court for a *de novo* determination of Petitioner's citizenship. The Court of Appeals issued a Memorandum decision November 14, 1977, granting the petition for review, setting aside the order of the Immigration Board and remanding the matter "with directions to transfer the proceedings to the United States District Court for the District of Arizona for a *de novo* determination of petitioner's claim to citizenship." This proceeding was filed in U.S. District Court March 6, 1978.

6. Petitioner was born November 29, 1933, and is the son of Luis Tapia-Sanchez and Carmen Martinez de Sanchez. Both parents are deceased.

7. Petitioner has the following living brothers and sister:

| <u>NAME</u> | <u>DATE AND PLACE OF BIRTH</u> |
|-------------|------------------------------------|
| Armando | January 31, 1917, Mexico |
| Rafaela | October 24, 1926, Nogales, Arizona |
| Luis | August 2, 1928, Nogales, Arizona |
| Enrique | July 15, 1931, Nogales, Arizona |

8. The births of Rafaela, Luis and Enrique were properly registered and a Certificate of Birth issued by the Arizona State Board of Health, Bureau of Vital Statistics. The birth of each child was attended by a midwife.

9. Luis and Carmen Sanchez returned to Mexico in 1933, and they left Armando and Luis in Nogales, Arizona to complete the school year. Armando and Luis attended public school in Nogales, Arizona, through the school year ending in May, 1933.

10. There is no contemporaneous record of Petitioner's birth in Nogales, Arizona. Petitioner was baptized as Francisco Martinez in Nogales, Arizona on August 30, 1936. The baptismal record shows residence as Nogales, Arizona.

11. Luis and Carmen Sanchez returned to Mexico prior to Petitioner's birth. Petitioner was born in the District of Imuris, Republic of Mexico on November 29, 1933. His birth in Mexico was registered on December 15, 1933.

12. Petitioner has always believed that he was born in Nogales, Arizona, based on conversations with his father and mother. This belief was shared by his brothers and sister.

13. Petitioner entered the United States in 1951, registered for the military draft in 1952, and was issued a draft card. The original draft card was lost in the mid-50s and he was issued a copy, which he still retains. The draft card shows Petitioner's place of birth as Nogales, Arizona.

14. Petitioner obtained a social security card in the mid-50s and he reported his place of birth as Nogales, Arizona.

15. In 1964, Petitioner registered the births of several of his children in Mexico and he claimed Nogales, Arizona as his place of birth.

16. Petitioner was advised in 1972 of his Mexican birth certificate during an investigation of his citizenship by the INS.

17. Petitioner applied for a delayed birth certificate from the State of Arizona in 1975 and he did not advise the state agency of the existence of the Mexican birth certificate, or the INS proceeding.

18. The testimony presented on behalf of Petitioner to establish his birth in Nogales, Arizona, was confusing, inconsistent and improbable. Several of the witnesses were relatives of Petitioner and as such, were interested in the proceeding.

19. Petitioner was convicted in October, 1980, of aiding and abetting in Transporting Illegal Aliens, a felony, in violation of Title 18, U.S.C. § 2 and Title 8, U.S.C. § 1324(a)(2), CR-80-39-PHX-RMB.

CONCLUSIONS OF LAW

1. This is a declaratory judgment action under 8 U.S.C. § 1105a(a)(5)(B) and 28 U.S.C. 2201 in which Petitioner seeks a judgment declaring that he is a natural born citizen of the United States.

2. There is no provision in the statutes conferring citizenship solely on the basis of long residence in the United States.

3. The Court, in a *de novo* proceeding, determines the credibility and weight to be given testimony.

4. Assuming that Petitioner established by a fair preponderance of the evidence that his claim of United States citizenship was not frivolous, the burden of proof shifted to the INS to prove by clear and convincing evidence that he was not a United States citizen.

5. There is no contemporaneous record made by governmental authority of Petitioner's birth in Nogales, Arizona on November 29, 1933, or otherwise.

6. There is a contemporaneous record made by governmental authority in official records of Petitioner's birth in the District of Imuris, State of Sonora, Republic of Mexico on November 29, 1933.

7. It was not necessary to present a birth certificate in 1952 when Petitioner registered for the military draft.

8. It was not necessary to present a birth certificate when Petitioner obtained a social security card in 1955.

9. Respondent INS has proved by clear and convincing evidence, including cross-examination of Petitioner's witnesses, that Petitioner is not a natural born citizen of the United States.

Accordingly,

IT IS ORDERED that Respondent Immigration and Naturalization Service serve and lodge a proposed form of Judgment within ten (10) days of this Order.

Dated this 5th day of January, 1982.

[signed, Earl H. Carroll]

U.S. District Judge

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|-------------------------|---|--------------------------|
| FRANCISCO SANCHEZ- |) | |
| MARTINEZ, |) | |
| |) | [Filed January 28, 1982] |
| Petitioner, |) | |
| vs. |) | |
| IMMIGRATION AND |) | CIV-78-170-PHX-EHC |
| NATURALIZATION SERVICE, |) | |
| Respondent. |) | JUDGMENT |
| _____ |) | |

This action came for hearing before the Court, Honorable Earl H. Carroll, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is ordered and adjudged that Petitioner is not a natural born citizen of the United States and that Respondent recover of Petitioner its costs of action.

DATED this 27th day of January, 1982.

[signed, Earl H. Carroll]

Earl H. Carroll,
United States District Judge

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|-------------------------|--------------|-----------------------|
| FRANCISCO SANCHEZ- |) | |
| MARTINEZ, |) | |
| | Plaintiff,) | [Filed June 21, 1982] |
| vs. |) | |
| U.S IMMIGRATION AND |) | NO. CIV 78-170 |
| NATURALIZATION SERVICE, |) | PHX-EHC |
| Defendant. |) | |
| _____ |) | |

TRIAL PROCEEDINGS/MOTION

Before: THE HONORABLE EARL H. CARROLL, JUDGE

Phoenix, Arizona
October 23, 1981
March 29, 1982

VOLUME III
(Pp 235 to 348)

Appearances:

For the Plaintiff: WILLIAM J. MALEDON
 and RON KILGARD
 Attorneys at Law

For the Defendant: ELIZABETH JUCIUS
 and JOHN HOLYA
 Asst. U.S. Attorneys

MR. KILGARD: I have nothing further.

THE COURT: Thank you.

There will be an order in the following respects, that with respect to finding number 8, I will add the additional sentence that "each child named there was born at an address on Elm Street and was delivered by a midwife."

With respect to finding 9, that the reference to Luis should be Manuel.

In other words, that Armando and Manuel attended school in Nogales, Arizona, through the school year ending in May, 1933.

Further that the testimony reflected that the family left Nogales, Arizona, and returned to Mexico prior to the end of the school year in May, 1933.

With respect to finding 16, in 1973, Petitioner's father told an INS official that Petitioner was born in Nogales, Arizona, that Petitioner's brother, Luis, was acting as an interpreter in that instance and the record of the interview also indicated confusion as to some matters on the part of the father.

I have already indicated my opinion with reference to clear, convincing and unequivocal and clear and convincing.

With respect to finding number 6 — or conclusion number 6, it will be amended to read as follows: "There is a record dated December 15, 1933, made by Governmental authority, an official record of Petitioner's birth in the District of Imuris, State of Sonora, Republic of Mexico on November 29, 1933. The Court concludes this is a contemporaneous record made so close in time to the birth as not to infer a fabrication."

In other respects, then, the motions pending are denied.

I take it we do have his status clarified at least for everyone's satisfaction pending the appeal?

Is that correct?

MR. KILGARD: As far as I am concerned, your Honor, yes.

THE COURT: Thank you, Mr. Kilgard. Thank you Mr. Holya.

(Whereupon the above proceedings were terminated.)

APPENDIX VI
CIVIL MINUTES OF THE UNITED STATES DISTRICT
COURT
FOR THE DISTRICT OF ARIZONA

PLACE: PHOENIX

| <u>Judge</u> | <u>Deputy Clerk</u> | <u>Court Reporter</u> |
|-----------------------------|---------------------|-----------------------|
| / / HON C. A. MUECKE | / / Rita Zambonini | / / Gloria Frandle |
| / / HON WILLIAM P. COPPLE | / / Becky Daudet | / / Tom Stalcup |
| / / HON VALDEMAR A. CORDOVA | / / Phyllis Martin | / / Bill McNutt |
| / / HON CHARLES L. HARDY | / / Meredith Ingle | / / Jean Moll |
| /X/ HON EARL H. CARROLL | /X/ Sally Feight | /X/ Bridget Brittan |
| / / HON WALTER E. CRAIG | / / Dorothy Ewart | / / Ted Behrens |

CIV- 78-170 PHX EHC

Francisco Sanchez-Martinez

vs. Immigration & Naturalization Service

(Plaintiff)

(Defendant)

DOCKET NUMBER

MATTER ON FOR HEARING

/ / Contd on reverse

(78)

Motion for New Trial or in the Alternative to Amend the Findings
of Fact & Conclusions of Law

APPEARANCES

/ / Contd on reverse

Ron Kilgard for Plaintiff;

Elizabeth Jucius and John Holya for Defendants

MINUTES

/ / Contd on reverse

Motion argued. ORDER that the motion is granted in part and denied in part.

Findings #8, #9 and #16 are amended as well as conclusion #6. The Motion is
denied in all other respects.

/ / Under Advisement / / Notice to Counsel / / Vacated Contd to: _____

DOCKETED BY:

DATE: March 29, 1982

[signed, Janice Garcia]

Deputy Clerk

**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

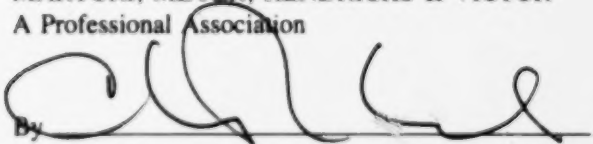
Respondent.

AFFIDAVIT OF MAILING AND SERVICE

COLIN F. CAMPBELL, being first duly sworn upon his oath,
deposes and says:

That on the ~~31~~³⁰ day of January, 1984, he mailed this Supplemental Appendix to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, to Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, and to Elizabeth Jucius Dunn, Assistant United States Attorney, 4000 United States Courthouse, 230 North First Avenue, Phoenix, Arizona 85025.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By 

Colin F. Campbell
Suite 4000
2700 North Third Street
Phoenix, Arizona 85004
Attorneys for Petitioner

SUBSCRIBED AND SWORN to before me this 30th day
of January, 1984, by Colin F. Campbell.

Arla M. Sands
Notary Public

My Commission Expires:

May 5, 1987